No. 14,847

IN THE

United States Court of Appeals

For the Ninth Circuit

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORP., LIMITED, a Corporation,

Appellant,

vs.

INDEPENDENT MILITARY AIR TRANSPORT ASSOCIATION, a Corporation,

Appellee.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF FOR APPELLANT.

The appeal is by the defendant from an adverse judgment in a noninjury action for $15,728.57 on a policy of fidelity insurance.

STATEMENT OF JURISDICTION.

The complaint in the District Court alleged that plaintiff was incorporated under the laws of the State of Delaware, and that the defendant was incorporated under the laws of the Kingdom of Great Britain. R. 3. The action was of a civil nature, and the matter

in controversy exceeded the sum or value of $3000 exclusive of interest and costs. R. 3-6. These allegations were admitted by the answer. R. 24. The District Court found them true. R. 27. Jurisdiction of the District Court is therefore sustained by 28 U.S.C., §1332.

The final judgment of the District Court was entered against appellant on June 17, 1955. R. 31-32. Notice of appeal therefrom was filed June 28, 1955. R. 32. The appeal was timely taken (R. 32) and timely docketed (R. 192). Rules of Civil Procedure, Rule 73 (a) (g). Jurisdiction of this court to review the judgment of the District Court is therefore sustained by 28 U.S.C., §§1291, 1294.

STATEMENT OF THE CASE.

The complaint alleged that defendant, as insurer, had issued a policy of fidelity insurance to plaintiff, as insured, indemnifying plaintiff up to $50,000 against loss caused by fraudulent or dishonest acts of its employees (R. 3-4), and also providing (R. 4):

> "If a loss is alleged to have been caused by the fraud or dishonesty of any one or more of the Employees and the Assured shall be unable to designate the specific Employee or Employees causing such loss, the Assured shall nevertheless have the benefit of this Insuring Agreement, provided that the evidence submitted reasonably (in case of inventory shortage, conclusively) establishes that the loss was in fact due to the fraud or dishonesty of any one or more of the said

> Employees, and provided further that the aggregate liability of the Company for any such loss shall not exceed the Limit of Liability applicable to this Insuring Agreement 1."

The complaint alleged due performance by plaintiff (R. 5), loss to plaintiff on or about November 27 or 28, 1953, of the sum of $15,728.57 "from a cash box in a drawer of a desk of an office occupied and used by plaintiff and its employees at the Oakland Municipal Airport in the City of Oakland, County of Alameda, State of California, being one of the premises specifically covered by said policy" and allegedly caused by fraud, dishonesty, or theft of one or more of plaintiff's employees (R. 5), and nonperformance by defendant (R. 6).

At the trial, the issues were "narrowed to two things, the amount of the loss and whether or not the loss was covered by the insurance policy". (R. 34.) On this appeal, the amount of the loss is not in dispute. The vital concern here is the court's Finding of Fact V (R. 29) and the legal consequences flowing therefrom, namely, the conclusion of law that plaintiff was entitled to judgment in the sum of $15,728.57, interest and costs (R. 30), and the resulting judgment in that sum (R. 31-32). Finding of Fact V was as follows (R. 29):

> "The said loss was alleged by plaintiff to be and the evidence adduced reasonably establishes that it was due to the dishonesty of one or more of plaintiff's employees rather than to the act of a stranger."

Plaintiff was in the business of air transportation. (R. 40.) It transported military personnel under government contract, and it also transported individual members of the military personnel under private contracts. (R. 40.) One of its offices was at the Oakland Municipal Airport in Alameda County. Moneys belonging to plaintiff and stolen from this office on the night of November 27, 1953, or the morning of November 28, 1953, gave rise to the present action.

Plaintiff's western regional manager at the Oakland Airport was Homer W. Scott (R. 162-163) and 7 or 8 employees of plaintiff worked under him (R. 46). Three of these had headquarters at the airport. One was Robert Lee Farquhar. His "main job" was to sell tickets and collect cash from individual passengers with whom plaintiff made private contracts for transportation. (R. 46.) Another was Mrs. Evelyn Keene. She was Scott's office assistant and secretary. (R. 78.) A third was Richard B. Held. He worked on the operation end and met inbound and loaded outbound aircraft. (R. 148.) All had keys to the office. (R. 75, 148.) Four other employees had headquarters away from the airport. (R. 65.) Janitorial work was done by Howard Pitts, who worked part time. (R. 60.)

The office was a two-room, lean-to affair divided by a glass paneled partition. (R. 54, 112.) The room known as the outside office opened onto a street. (R. 54.) A parking lot, always open to the public, was across the street. (R. 157, 183.) Two desks were located in the outside office. (R. 55.) There was evidence

that the front door, which opened into the outside office, could be opened without a key. (R. 93-94.) The room known as the inside office opened into a hangar always open to the public. (R. 54, 111-112.) Manager Scott occupied this office and it contained a single desk. (R. 55.) The back door leading from the inside office into the hangar was equipped with a bolt that went into a wooden slot that "had been sort of gnawed away". (R. 110.)

Sale of air transportation tickets to individual members of the military personnel occurred at Treasure Island or other points away from the Oakland Airport, and for convenience in handling moneys thus received, and not as a security measure, Farquhar, the District Sales Manager, had acquired on behalf of plaintiff a number of portable metal cash boxes. (R. 176, 186.) Two keys came with each box and keys were interchangeable—the key to one box would open all boxes of varying sizes. (R. 187-188.) One of these cash boxes was used in connection with the Oakland Airport office. (R. 188.) Farquhar kept one of the keys thereto, and the other was placed in a desk in the outside office. (R. 188.) Scott did not have a key to the box. (R. 189.)

A few days before Thanksgiving of 1953, a group of about 2000 Marines arrived at Treasure Island for reassignment and discharge. (R. 47.) In the sale of air transportation tickets to members of this group at Treasure Island, Farquhar used the cash box in receiving moneys, making change, and making refunds. (R. 47.) By Wednesday, November 25, 1953, a

sum of $15,000 or so had accumulated in a canvas bag into which the cash box had been emptied. (R. 47-51.) On the night of Wednesday, November 25, 1953, Scott and Mrs. Keene placed this canvas bag in the safe of the nearby Transoceanic Air Line. (R. 80-81.) It was put there to save expense, although the Washington office of the plaintiff had instructed Scott to wire the money to Washington by Western Union. (R. 165-166.)

Mrs. Keene obtained the money from the Transoceanic Air Line on the morning of Friday, November 27, 1953, and brought it to Scott at the office of plaintiff. (R. 85-86.) Checking ticket sales against the money began. (R. 85-86.) Counting of the money was by Scott and Farquhar. (R. 86.) Counting was still in progress when Mrs. Keene left the office around 7 p.m. and was not completed until after 8 p.m., when the money was placed in the cash box and the box locked. (R. 55-56, 167.) Conditions made it impracticable to again place the money in Transoceanic's safe. (R. 177-178.) Accordingly, the locked cash box was placed in a drawer of Scott's desk, and the drawer locked. (R. 56, 167.) Scott had a key to the desk but no key to the box, and Farquhar had a key to the box but no key to the desk. (R. 167.) Scott and Farquhar then left the office, but Scott returned to the office later and made telephone calls to his wife and to the Washington office of plaintiff. (R. 173-174.) There was evidence that the drawer of the desk could be opened without use of a key. (R. 92-93.) When the box was removed from the drawer of the desk on the morning of Saturday, November 28, 1953, and unlocked and

opened in the presence of Scott, Mrs. Keene, Farquhar, and Held it was empty as to currency. (R. 64, 90-92.) Scott, Mrs. Keene, Farquhar, and Held each denied taking the money or participating in the taking of it. (R. 169-170, 75, 104-105, 153.)

On the morning of November 28, 1953, one of the windows of the office was found unlatched. (R. 59.) Investigation by police officers after the theft disclosed no evidence of forcible entry to the premises, doors, windows, desks, or cash box. (R. 113-126, 131-137.) On frequent occasions before the theft the doors of the office, front and back, were found open when employees came to work. (R. 110-111.) In general, thefts at the Oakland Airport were not uncommon. (R. 155-159.) Keys to the premises were possessed by employees who had been discharged by plaintiff. (R. 109-110, 170-171.)

SPECIFICATION OF ERRORS.

1. The District Court erred in finding that "The said loss was alleged by plaintiff to be and the evidence adduced reasonably establishes that it was due to the dishonesty of one or more of plaintiff's employees, rather than to the act of a stranger", for the reason that the finding is clearly erroneous, the evidence is insufficient to support it, and the finding is contrary to the evidence and the law.

2. The District Court erred in concluding as a matter of law that plaintiff was entitled to judgment against defendant for any sum or sums.

3. The District Court erred in entering judgment against defendant for any sum or sums.

ARGUMENT.

1. SUMMARY OF ARGUMENT.

The judgment against defendant depends upon the soundness of Finding of Fact V. That finding is clearly erroneous. It rests entirely on speculation and conjecture. The evidence is not susceptible to a reasonable inference that plaintiff's loss was due to the dishonesty of one or more of its employees. The finding is defeated by the presumption that plaintiff's employees were innocent of crime or wrong. The judgment therefore lacks evidentiary support and should be reversed.

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2. THE JUDGMENT AGAINST DEFENDANT SHOULD BE REVERSED FOR THE REASON THAT IT LACKS EVIDENTIARY SUPPORT. (Specification of Errors, Nos. 1, 2, 3.)

It is obvious that the vitality of the judgment for plaintiff depends upon the vitality of the finding to the effect that plaintiff's loss was caused by dishonesty of one or more of its employees. Each employee who was in any way connected with the moneys claimed to have been lost testified unequivocally that he or she was not guilty of any dishonesty. That testimony is fortified by the strongest of all rebuttable presumptions, namely, that a person is innocent of crime or wrong. (Calif. Code. Civ. Proc., §1963 (1); *Estate of*

Nelson, 191 Cal. 280, 284, 216 P. 368; *Drown v. New Amsterdam Casualty Co.,* 175 Cal. 21, 23, 165 P. 5; *Metter v. Los Angeles Examiner,* 35 Cal. App. 2d 304, 308, 95 P. 2d 491.)

Whether an inference to the contrary may be drawn from the evidence is, of course, a question of law. (*Blank v. Coffin,* 20 Cal. 2d 457, 461, 126 P. 2d 868.) Circumstantial evidence will not permit such contrary inference in the present case, for as said in *Dobson v. Ind. Acc. Com.,* 114 Cal. App. 2d 782, 786, 251 P. 2d 349:

> "But to say that circumstantial evidence is consistent with a number of hypotheses, including that contended for by the party relying upon such evidence is not to say that it would support a finding of the truth of the hypothesis necessary to establish liability. We think that all that can be said in respect to this situation is that it furnished no more than a basis for speculation as to whether or not, by reason of the irregular driving pattern observed by the officer witness, Dobson might have been intoxicated. We think the case comes within the rule declared in *Reese v. Smith,* 9 Cal. 2d 324, 328, 70 P. 2d 933, that if the existence of an essential fact upon which a party relies is left in doubt or uncertainty the party upon whom the burden rests to establish that fact must offer proof, and not his adversary; that a judgment should not be based on guesses or conjectures and that a finding of fact must be an inference drawn from evidence rather than a mere speculation as to probabilities without evidence." (See, also, *McKellar v. Pendergast,* 68 Cal. App. 2d 485, 489, 156 P. 2d 950.)

Finding V is clearly erroneous and should therefore be set aside (Rule 52 (a), Rules of Civil Procedure), and since the vitality of the judgment depends upon the vitality of that finding the judgment in turn should be reversed.

CONCLUSION.

Appellant respectfully submits that the judgment appealed from should be reversed with directions to the trial court to enter judgment for appellant.

Dated, San Francisco, California,
January 16, 1956.

THOMAS E. DAVIS,
Attorney for Appellant.